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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

NO. 234

HENRY J. CZOSEK, *et al.*,
Petitioners,

v.

JOHN R. O'MARA, *et al.*,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

RELEVANT DOCKET ENTRIES

United States Court of Appeals for the Second Circuit

Date 1968		
March	15	Motion for Leave to Proceed in Forma Pauperis
"	15	Affidavit in Opposition to Motion
"	18	Record was filed
Apr.	2	Order denying Motion for Leave to file Forma Pauperis
Oct.	4	Motion to Dismiss Appeal
"	7	Affidavit in Opposition to Motion
"	7	Order denying Motion

Docket Entries

Date		
1969		
Feb.	24	Opinion and Judgment of the Court
Mar.	11	Petition for Rehearing
"	18	Order denying Rehearing

United States District Court for the Western District of New York.

Date		
1967		
Jan.	23	Filed Complaint and Demand for Jury Trial
"	23	Issued Summons, 2 dup. orig. & 9 copies
Feb.	1	Filed summons-served 1/26/67 Erie Lackawanna RR Co., Henry J. Czosek, Local #826; Fred R. McKernan & Anthony E. Matz-not served
Mar.	10	Filed summons-served 3/6/67 System Federation No. 78 & 100
Apr.	20	Filed Deft's Henry J. Czosek, Edward P. McEntee, System Federation No. 78 & 100, Motion to Dismiss, ret. 5/8/67
"	20	Filed Deft's Erie Lackawanna RR Co., Notice of Motion & Motion to Dismiss Complaint-ret. 5/29/67-dec. res.
1968		
Jan.	11	Filed Decision & Order dismissing complaint-Henderson, J. (notice & copy to Messrs. Lipsitz, Griffin and Shea)

Docket Entries

Feb.	5	Filed Pltf's Notice of Appeal (copy mailed to Messrs. Lipsitz and Griffin)

COMPLAINT

(Filed January 23, 1967)

UNITED STATES DISTRICT COURT
For The Western District of New York

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD and WALTER DALY,
Plaintiffs,

vs.

ERIE LACKAWANNA RAILROAD COMPANY; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; ANTHONY E. MATZ, International President, International Brotherhood of Firemen and Oilers; FRED R. McKERNAN, General Chairman, System Council No. 2, International Brotherhood of Firemen and Oilers; HENRY J. CZOSEK, Chairman Local No. 826, International Brotherhood of Firemen and Oilers; SYSTEM COUNCIL NO. 2, International Brotherhood of Firemen and Oilers; LOCAL NO. 826; SYSTEM FEDERATION NO. 78; and SYSTEM FEDERATION NO. 100,

Defendants.

Civil 1967-30

Complaint

FIRST: At all times hereinafter mentioned, Plaintiffs were and are citizens of the State of New York and the Defendant, Anthony E. Matz is a citizen of the State of Pennsylvania and the Defendant, International Brotherhood of Firemen and Oilers is a membership association having its principal place of business in a state other than New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

Complaint

SECOND: The action arises under the Interstate Commerce Act 49 USCA Sect. 5 *et seq.* The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

THIRD: This action arises under the Railroad Labor Act 45 USCA Sect. 151 *et seq.* The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

FOURTH: Plaintiffs herein were members of Local No. 826, System Federation No. 78 and System Council No. 2 of the International Brotherhood of Firemen and Oilers in the year 1962 and for a number of years prior thereto.

FIFTH: Plaintiffs herein were employed as stationary engineers of the Delaware, Lackawanna and Western Railroad in the year 1960 and for some years prior thereto and at the time the merger of the Erie Railroad and the Delaware, Lackawanna and Western Railroad was authorized by the Interstate Commerce Commission in September of 1960; Plaintiffs continued in their employment for the newly formed Erie Lackawanna Railroad Company.

SIXTH: The Plaintiffs remained in said employment until June 1962 when they were furloughed and never recalled having been replaced by "pre-merger" employees of the Erie Railroad.

SEVENTH: The furloughing of the Plaintiffs by the Erie, Lackawanna Railroad Company in 1962 and their subsequent replacement, was in effect, a termination of the employment relation by way of a discharge.

EIGHTH: The wrongful discharge of the Plaintiffs was a direct result of the merger of the Delaware, Lackawanna and Western Railroad Company and the Erie Railroad and in contravention of the Interstate Act 49 USCA Sect. 5 *et seq.;* the Plaintiffs have received no compensation from the Erie, Lackawanna Railroad Company as a result of their loss of employment.

Complaint

NINTH: The discharge of the Plaintiffs was a result of the merger of the Delaware, Lackawanna and Western Railroad Company and the Erie Railroad in contravention of the Implementing Agreement between the Erie, Lackawanna Railroad Company and its employees represented by System Federation No. 78 and System Federation No. 100, supplementing and implementing the Act 49 USCA Sect. 5 *et seq.;* the Plaintiffs have received no compensation from the Erie, Lackawanna Railroad Company as a result of their loss of employment.

TENTH: That contrary to the Railroad Labor Act 45 USCA Sect. 151 *et seq.* the Defendant Erie, Lackawanna Railroad Company not only failed to give Plaintiffs thirty (30) days written notice of intended change in working conditions, but also failed to give any notice of said change.

ELEVENTH: That the Plaintiffs repeatedly requested the Defendant International Brotherhood of Firemen and Oilers and its president, Anthony E. Matz, Defendants, System Council No. 2, System Federation No. 78 and System Federation No. 100 and their general chairman, Fred R. McKernan, and Defendant, Local No. 826 and its chairman, Henry J. Czosek, to process their claims against the Erie, Lackawanna Railroad Company and the aforementioned union, its officers and affiliates have been guilty of gross nonfeasance and hostile discrimination in their arbitrary and capricious refusal to process said claims, all to the detriment and damage of Plaintiffs.

TWELFTH: That the Defendant International Brotherhood of Firemen and Oilers and its president, Anthony E. Matz, Defendants System Council No. 2, System Federation No. 78, System Federation No. 100 and their general chairman, Fred R. McKernan, and Defendant Local No. 826 and its chairman, Henry J. Czosek, have breached their duty and have discriminated against the rights of

the Plaintiffs, by violating the express and implied terms of the collective bargaining agreement in effect by not representing the Plaintiffs fairly and impartially in the Plaintiffs' loss of employment and the resulting loss of compensation therefrom.

THIRTEENTH: Plaintiffs demand a trial by jury on all issues presented herein.

WHEREFORE, Plaintiffs demand judgment against Defendant Erie, Lackawanna Railroad Company or, International Brotherhood of Firemen and Oilers or Anthony E. Matz, System Council No. 2, System Federation No. 78 and System Federation No. 100, or Fred R. McKernan or, Local No. 826 or Henry J. Czosek, or against all in the sum of One Hundred Sixty Thousand Dollars ($160,000.00) and Costs and for such other and further relief as this Court deems just and proper.

Motion by Union Defendants to Dismiss Complaint

(Filed April 19, 1967)

[Title omitted in printing]

Now come defendants Henry J. Czosek, Henry J. Czosek as Chairman, Local Lodge 826 of the International Brotherhood of Firemen and Oilers, Local No. 826, Edward P. McEntee, System Federation No. 78, and System Federation No. 100, and respectfully move the Court to dismiss the complaint of the plaintiffs herein on the grounds that the Court lacks jurisdiction of the subject matter of the action, and that the complaint fails to state a claim upon which relief can be granted, and in support of said motion state as follows:

1. No facts are pleaded to support the asserted amount in controversy, there is no diversity of citizenship between all of the plaintiffs and all of the defendants, and there are no other allegations showing this Court's jurisdiction over the matters complained of.

2. By an Act of Congress known as the Railway Labor Act (45 U. S. C., Sec. 151 *et seq.*) jurisdiction over grievances and contract claims of railroad employees, such as those here asserted, has been withdrawn from the courts, both state and federal, and vested exclusively in the National Railroad Adjustment Board.

3. The complaint fails to allege, either verbatim or in substance, the provisions of any contract or statute upon which plaintiffs rely, and for breach of which this action may be maintained.

4. Although plaintiffs assert the conclusion that they were wrongfully discharged, it affirmatively appears from the complaint that they were not discharged.

Motion by Union Defendants to Dismiss Complaint

5. The complaint fails to allege resort to or exhaustion of plaintiffs' contractual and statutory administrative remedies.

6. The complaint fails to allege any action by these defendants resulting in injury or damage to plaintiffs for which this action may be maintained.

RICHARD LIPSITZ,
One Niagara Square,
Buffalo, New York 14202

RICHARD R. LYMAN,
741 National Bank Building,
Toledo, Ohio 43604

Attorneys for Defendants, Henry J. Czosek and Henry J. Czosek as Chairman, Local Lodge 826, *Edward P. McEntee for System Federation No.* 78 *and Edward P. McEntee for System Federation No.* 100.

Of Counsel:
Lipsitz, Green, Fahringer,
Roll, Schuller & James,
One Niagara Square,
Buffalo, New York 14202.

Mulholland, Hickey & Lyman,
741 National Bank Bldg.
Toledo, Ohio 43604.

Motion by Defendant Railroad to Dismiss Complaint.

To:

Flaherty & Shea,
Attorney for Plaintiffs,
Office and P. O. Address,
2010 Liberty Bank Building,
Buffalo, New York 14202.

Mullholland, Hickey & Lyman,
Attorneys for Defendants Other
than Erie Lackawanna Railroad Company,
Office and P. O. Address,
741 National Bank Building,
Toledo, Ohio.

Lipsitz, Green, Fahringer, Roll,
Schuller & James,
Attorneys for Defendants Other than
Erie Lackawanna Railroad Company,
Office and P. O. Address,
1 Niagara Square,
Buffalo, New York 14202.

Motion by Defendant Railroad to Dismiss Complaint

(Filed April 20, 1967)

[Title omitted in printing]

Defendant Erie Lackawanna Railroad Company respectfully moves the Court, under Rule 12 of the Federal Rules of Civil Procedure, for an order dismissing the complaint against it upon the ground that the Court lacks jurisdiction over the subject matter and the complaint herein fails to state a claim upon which relief can be granted,

and in support of the motion represents to the Court that the complaint shows on its face that the controversy described therein is one governed by the *Railway Labor Act*, 45 U. S. C. A. Section 151 *et seq.*, and the complaint does not allege that the plaintiffs have exhausted the administrative remedies available to them and it does not allege that the plaintiffs have received an award from the National Railroad Adjustment Board both of which are conditions precedent to a cause of action and jurisdiction of this Court. Submitted herewith is the affidavit of Richard F. Griffin, sworn to April 20, 1967, in support of the motion and the grounds upon which it is made. Upon the return date of this motion the defendant Erie Lackawanna Railroad Company will move the Court for such other and further relief as the Court may deem just and proper.

Dated: Buffalo, New York,
April 20, 1967.

MOOT, SPRAGUE, MARCY,
LANDY & FERNBACH,

By Richard F. Griffin,
A Member of the Firm,
Attorneys for Defendant Erie Lackawanna Railroad Company,
400 Erie County Savings Bank Building,
Buffalo, New York 14202.

Affidavit of Richard F. Griffin in Support of Motion of Defendant Railroad

[Title omitted in printing]

State of New York,
County of Erie,
City of Buffalo. } ss.:

RICHARD F. GRIFFIN, being duly sworn, deposes and says that he is a member of the firm of Moot, Sprague, Marcy, Landy & Fernbach, attorneys for the defendant Erie Lackawanna Railroad Company, and submits this affidavit in support of the motion of the defendant Erie Lackawanna Railroad Company for an order dismissing the within action as against the Erie Lackawanna Railroad Company on the grounds that the Court lacks jurisdiction over the subject matter and the complaint fails to state a claim upon which relief can be granted.

That as it more fully appears from the complaint, the plaintiffs allege to have been wrongfully discharged by the defendant Erie Lackawanna Railroad Company in 1962.

It is not clear from plaintiffs' complaint the basis upon which the jurisdiction of this Court is deemed to exist. The defendant Erie Lackawanna Railroad Company is a New York domestic corporation, and the plaintiffs each allege that they are citizens of the State of New York. Accordingly, there is no diversity between the plaintiffs and the defendant Erie Lackawanna Railroad Company.

That the complaint further alleges in paragraphs Second and Third that the action arises under the Interstate Commerce Act and under the Railway Labor Act. Your

deponent is not aware of any basis of jurisdiction under the Interstate Commerce Act and respectfully submits to the Court that under the *Railway Labor Act*, 45 U. S. C. A. 151 *et seq.*, the District Court only has jurisdiction after a railroad employee has exhausted his administrative remedies and procedures and after he has an award from the National Railroad Adjustment Board with which the defendant railroad refuses to comply.

The plaintiffs' complaint does not allege the exhaustion of administrative remedies nor does it allege that the plaintiffs have received an award from the N. R. A. B. with which the defendant railroad refuses to comply.

Upon information and belief, the plaintiffs were employed by the defendant Erie Lackawanna Railroad Company in connection with the Michigan Avenue power plant, Buffalo, New York, and their work came to an end on or about June 2, 1962 due to the closing down of the Michigan Avenue power plant because of its obsolescence. Upon information and belief, thereafter on or about December 26, 1962 the plaintiffs requested Master Mechanic C. E. Maahs of the defendant Erie Lackawanna Railroad Company to review the matter, and on or about February 20, 1963 were advised by letter from the said C. E. Maahs that any claim was denied. Upon information and belief, no further action was taken by plaintiffs as against the defendant Erie Lackawanna Railroad Company until on or about January 23, 1967 when the complaint was filed herein.

Your deponent respectfully prays for an order of the Court dismissing the action upon the grounds that plain-

tiffs have not perfected any rights by exhausting their administrative remedies nor have they received an award of the N. R. A. B. both of which are conditions precedent to a cause of action and jurisdiction of this case.

RICHARD F. GRIFFIN.

Subscribed and sworn to before me
this 20th day of April, 1967.
Caesar J. Naples,
Notary Public, State of New York,
Qualified in Erie County,
My Commission Expires March 30, 1969.

Affidavit of James P. Shea in Opposition to Motions of Union Defendants and Defendant Railroad

[Title omitted in printing]

State of New York,
County of Erie,
City of Buffalo. } ss.:

JAMES P. SHEA, being duly sworn, deposes and states that he is a member of the law firm of Flaherty & Shea, attorneys for the Plaintiffs herein, and submits this affidavit in opposition to the motions made by all the defendants herein to dismiss the complaint.

That there are three separate and distinct claims set forth in the complaint and may be described briefly as follows:

(1) Against the Erie Lackawana Railroad Company for wrongful discharge.

(2) Against the Unions for breach of the duty of fair representation and with the Railroad joined in this claim as a necessary party.

(3) Against the Railroad for their failure to grant the plaintiffs their rights under the Interstate Commerce Act and under the Interstate Commerce Commission order allowing the merger.

That the plaintiffs do not have to allege facts or damages in their complaint under the Federal Rules.

That the National Railroad Adjustment Board does not have exclusive jurisdiction in claims involving wrongful discharge by Railroads and the National Railroad Adjustment Board has no jurisdiction whatsoever in claims wherein it is asserted a violation of rights under a federal statute and Commission order.

Affidavit of James P. Shea in Opposition to Motions of Union Defendants and Defendant Railroad

WHEREFORE, your deponent respectfully requests that this Court grant an Order denying the motions made by the respective defendants herein and for such other and further relief as the Court may deem just and proper.

Dated: Buffalo, New York.
May 25th, 1967.

FLAHERTY & SHEA,
(James P. Shea, of counsel),
Attorneys for Plaintiffs,

2010 Liberty Bank Building,
Buffalo, New York 14202,
852-6896.

DECISION AND ORDER OF DISTRICT COURT

(Issued January 10, 1968, Entered January 11, 1968)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN R. O'MARA; GEORGE McCORMICK; JULIUS PACKARD; and WALTER DALY,
Plaintiffs

—vs— CIVIL 1967-30

ERIE LACKAWANNA RAILROAD COMPANY; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; ANTHONY E. MATZ, International President, International Brotherhood of Firemen and Oilers; FRED R. McKERNAN, General Chairman, System Council No. 2, International Brotherhood of Firemen and Oilers; HENRY J. CZOSEK, Chairman Local No. 826. International Brotherhood of Firemen and Oilers; SYSTEM COUNCIL NO. 2, International Brotherhood of Firemen and Oilers, LOCAL NO. 826; SYSTEM FEDERATION NO. 78; and SYSTEM FEDERATION NO. 100,
Defendants.

Lipsitz, Green, Fahringer, Roll, Schuller & James (Richard Lipsitz, Esq., of Counsel, Buffalo, New York, Attorney for Defendants Henry J. Czosek, Henry J. Czosek as

Chairman, Local Lodge 826, and Edward P. McEntee.
Moot, Sprague, Marcy, Landy & Fernbach (Richard F. Griffin, Esq., of Counsel), Buffalo, New York, Attorneys for Defendant Erie Lackawanna Railroad Company.

Flaherty & Shea (James P. Shea, Esq., of Counsel), Buffalo, New York, Attorneys for Plaintiffs.

The plaintiffs are members of Local 826, System Federation No. 78 and Council No. 2 of the International Brotherhood of Firemen and Oilers. They were originally employed as stationary engineers of the Delaware, Lackawanna & Western Railroad. In September of 1960, however, the Interstate Commerce Commission authorized the merger of the Delaware, Lackawanna & Western Railroad with the Erie Railroad into the present Erie Lackawanna Railroad. Thereafter, in June of 1962, the plaintiffs were furloughed from their employment and replaced by pre-merger employees of the Erie Railroad.

The plaintiffs commenced this action seeking damages alleged to flow from their loss of employment. Before the court are motions by the defendants, who have been served in this action, to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim for which relief can be granted.

Decision and Order of District Court

Inasmuch as diversity of citizenship clearly is lacking as among the parties, jurisdiction may not be predicated upon that ground. *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 65, 71 (1939), *American Fire & Cas. Co.*, vs *Finn*, 341 U. S. 617 (1951). The plaintiffs argue, however, that the action may be sustained either as a suit for wrongful discharge or as a suit based upon hostile discrimination.

Assuming, without deciding, that the complaint may be viewed as a discharge grievance subject to arbitration under the Railway Labor Act (45 U. S. C. §§151 et seq.), the action would be governed by the principles set forth in *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630 (1941) and *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653 (1953). *Walker* v. *Southern Ry. Co.*, 385 U.S. 196 (1966). These decisions permit an aggrieved railroad employee to elect to treat his discharge as final without exhausting his administrative remedies when, and only when, diversity jurisdiction exists and such exhaustion is not required under applicable state law. See *Larson* v. *American Air Lines, Inc.*, 313 F. 2d 599, 602 (2d Cir. 1963); *Walters* v. *Chicago & Northwestern Ry. Co.*, 216 F. 2d 332, 335-336 (7th Cir. 1954). Here, not only is diversity jurisdiction lacking, but it also seems clear that the New York courts would require exhaustion. See *Pacilio* v. *Pennsylvania R.R. Co.*, 381 F. 2d 570 (2d Cir. 1967). The complaint does not allege, and in opposition to this motion the plain-

tiffs have not claimed that they have exhausted their administrative remedies.

Although the plaintiffs use the phrase "hostile discrimination" in asserting that the defendants arbitrarily and capriciously failed to process their claims, use of that phrase alone does not bring their claim within the rationale of *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192 (1944). No attack is directed at the validity of the collective bargaining agreement and no claim is made that these plaintiffs could not personally press their rights under the collective bargaining agreement. *Cf. Ferro v. Railway Express Agency, Inc.*, 296 F. 2d 847 (2d Cir. 1961).

Finding no basis for federal jurisdiction, the complaint is dismissed. So ordered.

/s/ John O. Henderson
JOHN O. HENDERSON
United States District Judge

DATED: Jan. 10, 1968.

OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

For The Second Circuit

No. 211—September Term, 1968.

(Argued December 4, 1968 Decided February 24, 1969.)

Docket No. 32184

John R. O'Mara, George McCormick
Julius Packard and Walter Daly,
Plaintiffs-Appellants

—v.—

Erie Lackawanna Railroad Company, International Brotherhood of Firemen and Oilers, Henry J. Czosek, Henry J. Czosek as Chairman of Local 826, and Edward P. McEntee,
Defendants-Appellees.

B e f o r e:

Lumbard, *Chief Judge*, Friendly, *Circuit Judge*, and Frankel, *District Judge*.*

Appeal from an order of the District Court for the Western District of New York, Henderson, J., granting defendant's motion to dismiss the complaint for lack of federal jurisdiction.

Reversed and remanded.

* Sitting by designation

James P. Shea, Buffalo, N.Y. (Flaherty & Shea, on the brief), *for plaintiffs-appellants.*

Richard F. Griffin, Buffalo N.Y. (Moot, Sprague, Marcy, Landy & Fernbach, and Courtland R. LaVallee, on the brief), *for appellee, Erie Lackawanna Railroad Company.*

Richard R. Lyman, Toledo, Ohio (Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo N. Y., and Mulholland, Hickey & Lyman, Toledo, Ohio, on the brief), *for defendants-appellees Henry J. Czosek, Henry J. Czosek as Chairman, etc., and Edward P. McEntee, etc.*

Lumbard, *Chief Judge*:

Plaintiffs brought this action in the District Court for the Western District of New York seeking damages for their allegedly wrongful discharge, without compensation, from employment as stationary engineers with the Erie Lackawanna Railroad. Joined as defendants with the Railroad are the International Brotherhood of Firemen and Oilers and several of its affiliates and officers. The complaint alleged that the union defendants had been guilty of "hostile discrimination" in refusing to process plaintiffs' grievances against the Railroad.

The district court granted defendants' motion to dismiss the complaint, finding no basis for federal jurisdiction.

We reverse. We hold that the complaint, read in the generous spirit appropriate under the Federal Rules, states a federal claim against the union for breach of its duty of fair representation. On remand we grant plaintiffs leave to amend their complaint, if they can, to state a cause of

action against the Railroad based on its having acted with knowledge of the union's discrimination. *Glover* v. *St. Louis-San Francisco Ry. Co.*, 37 U. S. L. W. 4084 (U. S. Jan. 14, 1969); *Ferro* v. *Railway Express Agency, Inc.*, 296 F.2d 847 (2d Cir. 1961).

Prior to 1960 the plaintiffs were employed by the Delaware, Lackawanna & Western Railroad as stationary engineers in a power plant in Buffalo, New York. In that year the Delaware merged with the Erie Railroad, with the approval of the Interstate Commerce Commission, forming the present defendant Erie Lackawanna line. Plaintiffs were continued in their former positions by the merged line until 1962, when they were furloughed.

The complaint is very grudging in its recitation of the claims upon which federal jurisdiction is invoked. It is alleged that the 1962 furlough constituted a discharge of plaintiffs since they were never recalled and were in fact replaced by employees who had worked for the Erie Railroad before the merger. The complaint then claims that the discharges were the direct result of the 1960 merger, and violated "the Interstate Act 49 USCA Sect. 5 et seq." and the "Implementing Agreement" between the Erie Lackawanna and its employees represented by defendant unions. A violation of the Railway Labor Act, 45 U.S.C.A. §151 *et seq.*, is also alleged in that the Railroad failed to give the required 30 days written notice of an intended change in working conditions prior to the discharge of the plaintiffs.

Finally it is alleged that plaintiffs repeatedly requested the defendant unions and their officials to process their claims against the Railroad, but that these defendants "have been guilty of gross nonfeasance and hostile discrimi-

nation in their arbitrary and capricious refusal to process said claims," and "have breached their duty and have discriminated against the rights of the Plaintiffs, by violating the express and implied terms of the collective bargaining agreement in effect by not representing the Plaintiffs fairly and impartially in the Plaintiff's loss of employment and the resulting loss of compensation therefrom." The prayer is for judgment in the sum of $160,000 against any or all of the defendants.

The district court was correct, on the allegations before it, in dismissing the portion of the complaint claiming a violation of the Implementing Agreement by the Railroad in discharging plaintiffs. It is settled that such a contract dispute between employees and a railroad falls within the primary jurisdiction of the National Railroad Adjustment Board, 45 U.S.C. §153 First (i). See *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. R. Co.*, 353 U. S. 30, 34-35, 39 (1957); *Walker* v. *Southern R. R. Co.*, 385 U. S. 196, 198 (1966). It follows that plaintiffs cannot maintain an action for damages under federal law since their complaint does not allege that they have exhausted their remedy before the Board. The union's refusal to process their grievances does not excuse plaintiff's failure to exhaust since individual employees have standing to prosecute their own grievances before the Board, 45 U.S.C. §153 First (j); cf. *Pacilio* v. *Pennsylvania R.R. Co.*, 381 F. 2d 570, 572 (2d Cir. 1967). Nor is this conclusion altered by the allegation that the Railroad failed to give to the union the 30 days notice of a change in working conditions required by 45 U. S. C. §156. See *Hudie* v. *Aliquippa & Southern Railroad Co.*, 249 F. Supp. 210,

212 (W. D. Pa.), *aff'd per curiam* 360 F. 2d 213 (3rd Cir. 1966).

Ostensibly the complaint alleges that the Railroad's action was wrongful in two distinct respects, i. e., that it violated the Implementing Agreement between the Railroad and the union, and that it violated the Interstate Commerce Act. In reality, however, it appears that the basis of both these claims lies in the Implementing Agreement, and that therefore the doctrine of exhaustion of administrative remedies is fatal to both claims.

On appeal we are informed that the section of the Act relied upon is 49 U. S. C. §5 (2) (f),[1] which provides certain

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1 49 U. S. C. §5(2) (f) provides:

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

safeguards for employees affected by a railroad merger. The Supreme Court has ruled that this section does not prevent the discharge of employees as a result of a merger, but rather relates only to questions of compensation. *Brotherhood of Maintenance of Way Employees* v. *United States,* 366 U. S. 169 (1961). The complaint provides us with no indication that plaintiffs are attacking any action taken by the Interstate Commerce Commission under §5(2) (f), nor does it allege in what respect the section has been violated. The section does authorize a railroad and union to enter into an agreement protecting the interests of workers affected by a merger. To the extent that plaintiffs have been wronged it appears to have been through a misapplication of the Implementing Agreement. Thus once again we have the type of employee-employer contract dispute which under federal law must be submitted first to the Railroad Adjustment Board and not to the courts. Cf. *Arnold* v. *Louisville & Nashville R. R. Co.,* 180 F. Supp. 429 (M. D. Tenn. 1960), *aff'd sub nom. Batts* v. *Louisville & Nashville R. R. Co.,* 316 F. 2d 22 (6th Cir. 1963). Dismissal of this portion of the complaint was proper, in addition, because it did not give defendants "fair notice" of the basis of plaintiffs' claim under the Act. *Conley* v. *Gibson,* 355 U. S. 41, 47 (1957).

But we think that a different result is required concerning the portion of the complaint which alleges "hostile discrimination" on the part of the union defendants in refusing to process plaintiffs' claims against the railroad. In *Steele* v. *Louisville & Nashville R. R. Co.,* 323 U. S. 192, 203 (1944), the Supreme Court held that the Railway Labor Act imposes upon unions a duty to represent fairly, without "hostile discrimination," all workers within a bargain-

ing unit. Since a charge by an employee against a union for a violation of this duty does not involve a dispute between "an employee or group of employees and a carrier or carriers," 45 U. S. C. §153 First (i), it does not fall within the jurisdiction of the Railroad Adjustment Board. Therefore it may be the basis of a suit in a federal district court. *Conley v. Gibson*, 355 U. S. 41 (1957); *Cunningham* v. *Erie Railroad Co.*, 266 F. 2d 411, 414-16 (2d Cir. 1959).

This is true even where the claim of hostile discrimination is based on the union's failure to process a grievance and it is clear that the employees themselves could have carried their grievance to the Adjustment Board. The Supreme Court has held that this right to process a grievance personally cannot excuse a union's refusal to fulfill its duty of fair representation, for the union is in a far better position successfully to process a grievance than are individual workers. *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957). Thus, we disagree with the district court and hold that plaintiffs need not establish that they "could not personally press their rights under the collective bargaining agreement" in order to maintain this action against the union.

The only real question is whether the complaint's allegation of "hostile discrimination" is so unexplicated that it fails to give union defendants fair notice of the ground of plaintiffs' claim. The only hint concerning the nature of the discrimination is the complaint's statement that plaintiffs were replaced by " 'pre-merger' employees of the Erie Railroad."

The complaint does not make clear the basic reason why the plaintiffs are aggrieved, as stated to us upon the argument of the appeal, namely, that the union defendants are under the influence of the former employees of the Erie

Railroad and as a result are not representing fairly the interests of the former employees of the Delaware, Lackawanna & Western Railroad in the merged line. It is settled that such a claim of political discrimination states a good cause of action under the Railway Labor Act. *Ferro* v. *Railway Express Agency, Inc.*, 296 F. 2d 847, 851 (2d Cir. 1961).

While we do not think that this basis of the claim can be fairly inferred from the face of the complaint, by the exercise of the liberal pre-trial and discovery devices available to them the defendants will be able to dispel any possible prejudice to them arising from the very broad nature of the allegations. See *Conley* v. *Gibson*, 355 U. S. 41, 47-48 (1957). Particularly in suits of this kind, where the courts are called upon to fulfill their role as the primary guardians of the duty of fair representation, complaints should be construed whenever possible to avoid dismissals based on technical deficiencies in the specificity of the allegations. At the least a plaintiff should be given the opportunity to file supplemental pleadings unless it appears "beyond doubt" that he cannot state a good cause of action. *Cf. Conley* v. *Gibson*, 355 U. S. 41, 45-46 (1957).

On remand we hold plaintiffs should be granted leave to amend their complaint to state a cause of action against the Railroad, if they can, within the doctrine of *Ferro* v. *Railway Express Agency, Inc.*, 296 F. 2d 847, 851 (2d Cir. 1961). There we suggested that, in a suit against a union for "hostile discrimination" the employer can be joined as a party defendant if it "acted from a motive to discriminate or with knowledge that the [union] was discriminating." 296 F. 2d at 851. Where the employer's action is only a consequence of the union's discriminatory conduct, *e. g.*,

Cunningham v. *Erie Railroad Co.*, 266 F. 2d 411 (2d Cir. 1959), or takes the form of joint discrimination with the union, then plaintiffs should be allowed to join the employer and the union in one action. *Glover* v. *St. Louis-San Francisco Ry Co.*, 37 U. S. L. W. 4084 (U. S. Jan. 14, 1969). And since the dispute draws its basic character from the union's violation of its duty of fair representation, recourse to the Railroad Adjustment Board should not be required insofar as the employer is fairly alleged to be implicated in the union's illegal conduct. *Id.*, 37 U. S. L. W. at 4085-86.

But dismissal of the employer from this suit will be proper if it appears that its action furloughing the plaintiffs, and the union's discriminatory refusal to process grievances concerning these furloughs, were not part of a combined attempt to discriminate. In that event plaintiffs' complaint against the Railroad would concern a violation of their rights under the collective bargaining agreement and this, as discussed above, falls within the exclusive primary jurisdiction of the Adjustment Board.

The order of the district court is reversed and the complaint against the union is reinstated, with leave to the plaintiffs to amend the complaint to state a cause of action against the Railroad. If plaintiffs are unable so to amend then the complaint against the Railroad should be dismissed.

JUDGMENT OF COURT OF APPEALS

(Entered February 24, 1969)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of February, one thousand nine hundred and sixty-nine.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge

HON. HENRY J. FRIENDLY,
Circuit Judge,

HON. MARVIN E. FRANKEL,
District Judge.

John R. O'Mara, George McCormick, Julius Packard and Walter Daly,
Plaintiffs-Appellants,

v.

Erie Lackawanna Railroad Co., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of New York.

Judgment of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this Court with costs to be taxed against the appellees.

A. DANIEL FUSARO
Clerk

ORDER OF COURT OF APPEALS DENYING REHEARING

(Entered March 18, 1969)

32184

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

John R. O'Mara, George McCormick,
Julius Packard and Walter Daily,
Plaintiffs-Appellants,

v.

Erie Lackawanna Railroad Company,
et al.,
Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the International Brotherhood of Firemen and Oilers, Henry J. Czosek, Henry J. Czosek as Chairman of Local 826, and Edward P. McEntee, appellees herein.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Denied.

/s/ J. Edward Lumbard
U. S. C. J.
Marvin E. Frankel
U. S. D. J.

Supreme Court of the United States

No. 234 ---- , *October Term, 19* 69

Henry J. Cacsek, et al.,

Petitioners,

v.

John R. O'Mara, et al.

ORDER ALLOWING CERTIORARI. Filed October 13 -------- , 19 69.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ---------- Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.